SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 909

PHOENIX-EL PASO EXPRESS, INC., PETITIONER,

vs.

NATIONAL CARLOADING CORPORATION.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

May It Please The Honorable Court:

Opinions of the Courts.

The written opinion of the Court of Civil Appeals appears at Page 41 of the Record, but same has not been and will not be published, by order of that Court (R. 50). The opinion of the Court of Civil Appeals on petitioner's motion for rehearing appears on Page 55 of the Record and likewise will not be published. The opinion of the Supreme Court of Texas on original submission appears at Page 63 of the Record, and same has not yet been officially published, but will be found reported in 176 S. W. 2d. 564. The Supreme Court of Texas did not write any opinion on petitioner's motion for rehearing herein.

Grounds of Jurisdiction Invoked.

I.

The Supreme Court of Texas ruled that Section 419 of Part IV of the Interstate Commerce Act was applicable to petitioner's cause of action and granted respondent immunity from liability against petitioner's cause of action. Said statute is comparatively recent, having been approved May 16, 1942, and neither the construction nor the application of said statute has been passed upon by this Honorable Court.

II.

The Supreme Court of Texas based its opinion upon the sole ground that said statute was applicable to petitioner's cause of action and barred petitioner any recovery against respondent.

III.

In thus construing and applying said statute, the Supreme Court of Texas held in a way probably not in accord with the applicable decisions of the Supreme Court of the United States in that:

A. Said Section 419 of Part IV of the Interstate Commerce Act was intended by the Congress to apply only to criminal prosecutions and penal forfeitures.

B. Said statute was not intended by the Congress to have a retroactive operation as to civil causes of action, such as petitioner's suit herein.

C. If the Congress had intended said statute to apply to civil causes of action which had already accrued at the time of the enactment of said law, such intended application would render said statute unconstitutional and repugnant to the "due process clause" of the Fifth Amendment to the Constitution of the United States.

Concise Statement of the Case.

In the interest of brevity, we shall not repeat the statement of the nature of the case as shown in our foregoing petition for certiorari, but will now briefly supplement such statement.

Petitioner's predecessor and assignor, at all material times, was a federal motor common carrier within the meaning of Part II of the Interstate Commerce Act and was authorized to, and did transport freight under a certificate of public convenience and necessity issued by the Interstate Commerce Commission (R. 78, 63). Between July 28, 1937, and November 7, 1937, petitioner's predecessor and assignor transported for respondent nine shipments of freight from El Paso, Texas, to Phoenix, Arizona. Each of the shipments in question was made under a straight bill of lading or shipping order issued by respondent, which stipulated that the property was received subject to classifications and tariffs in effect on the date of issue.

For such nine shipments, which were admittedly interstate commerce, petitioner's predecessor and assignor was paid by respondent freight charges based upon the rate of Forty-Five Cents per hundred pounds. It was stipulated that the legal rate for such shipments was Eighty-Five Cents per hundred pounds, as shown by the tariffs of petitioner's predecessor and assignor on file with the Interstate Commerce Commission.

If the published rates of petitioner's predecessor and assignor had been charged for such shipments, the charges therefor would have been Twenty One Hundred Twenty Two Dollars and Eighty Four Cents ($2122.84), which is Nine Hundred Ninety Nine Dollars and Sixty Eight Cents ($999.68) in excess of the amount actually collected. The latter amount was recovered by petitioner against respondent by judgment in the trial court (R. 78, 65).

Respondent, at all material times, was a freight forwarder conduction a nation-wide freight forwarding business (R. 78, 63). Petitioner concedes that respondent was thus engaged, and petitioner further concedes that at all material times, respondent was a freight forwarder within the meaning of Part IV of the Interstate Commerce Act, as defined by Section 402 thereof (49 U. S. C. Sec. 1002). At all material times, respondent had on file with the Interstate Commerce Commission its purported tariffs, naming through rates to be collected on its billing from shippers and consignees, and petitioner's predecessor and assignor had duly filed its concurrences as a participant in respondent's purported published tariffs (R. 78, 63).

Respondent, on February 10, 1935, filed application with the Interstate Commerce Commission for a certificate of public convenience and necessity under the "grandfather clause" of the Motor Carrier Act of 1935 (49 U. S. C. Sec. 306a). On January 4, 1940, the Interstate Commerce Commission denied respondent's application for certificate and found that respondent was neither a common carrier by motor vehicle, nor a contract carrier by motor vehicle, under the provisions of the Motor Carrier Act of 1935 (R. 78, 66-67). On May 7, 1940, the Interstate Commerce Commission ruled that the operations of respondent and its tariffs and joint rates filed with the Commission were improperly on file, and that respondent and other similar operators were not entitled to share in joint rates or divisions of through rates with motor common carriers (R. 78, 66-67).

Inasmuch as respondent had claimed the right to share in a division of joint rates with petitioner's predecessor and assignor, and settlement by the parties had been arrived at, under an oral arrangement between the parties, for the Forty-Five Cent rate, petitioner brought suit for the difference in freight charges between the Eighty-Five Cent and

Forty-Five Cent rates (R. 1-11). Petitioner recovered judgment against respondent on October 28, 1941 (R. 26-33).

While the cause was pending in the Court of Civil Appeals on appeal by respondent, the Congress enacted Part IV of the Interstate Commerce Act (Public Law No. 558, 77th Congress, 2d Session, app. May 16, 1942) (Act May 16, 1942, c. 318 § 1 Stat. 284) (Tit. 49 U. S. C. Secs. 1001-1022).

The respondent interposed said statute as a complete defense to this suit, and it was by virtue of said statute that the Court of Civil Appeals held that the respondent was not liable for the undercharges claimed (R. 68). The Supreme Court of Texas, in affirming the opinion of the Court of Civil Appeals, said:

"We think the Court of Civil Appeals was correct in its conclusion that the quoted section from the 1942 amendment (Sec. 419 of Part IV of the Interstate Commerce Act) is a complete bar to the recovery of the plaintiff" (R. 69).

Specification of Assigned Errors to Be Urged.

I.

The Supreme Court of Texas erred in affirming judgment of the Court of Civil Appeals and in holding that Section 419 of Part IV of the Interstate Commerce Act bars any recovery by petitioner against respondent, and in particular, erred in holding that said statute was intended to be applicable to petitioner's cause of action which accrued long prior to the passage of said act of Congress (Germane to Assigned Errors I and II, petitioner's motion for rehearing, R. 75).

II.

The Supreme Court of Texas erred in failing to hold that said statute was limited to criminal liability or punishment,

and in holding that such statute applied to civil liability (Germane to Assigned Error III, petitioner's motion for rehearing, R. 75).

III.

The Supreme Court of Texas erred in holding that said statute granted respondent immunity from civil liability (Germane to petitioner's Assigned Error IV, motion for rehearing, R. 76).

IV.

The Supreme Court of Texas erred in holding that said statute was intended to have a retroactive effect, and further erred in holding that petitioner's cause of action was a mere statutory right which could be repealed (Germane to petitioner's Assigned Errors VII and VIII, R. 76).

V.

The Supreme Court of Texas erred in holding that said statute is constitutional and not violative of the "due process clause" of the Fifth Amendment to the Constitution of the United States of America insofar as said statute was intended to be or was, in fact, applicable to petitioner's cause of action (Germane to petitioner's Assigned Errors V and VI, motion for rehearing, R. 76).

Summary of Argument.

Petitioner's predecessor and assignor carried the nine freight shipments in question from El Paso, Texas, to Phoenix, Arizona, in 1937. At such time, petitioner's predecessor was the holder of a certificate of public convenience and necessity as a federal motor common carrier. It had on file with the Interstate Commerce Commission its duly established and published tariffs governing the shipments in question. Its applicable rates required the payment of freight charges based upon a rate of Eighty-

Five Cents per hundred pounds. Under the applicable law (Sec. 217b, Part II, Interstate Commerce Act) (49 U. S. C. Sec. 317b), it could not legally deviate from its filed tariffs. By collecting and receiving as freight charges from respondent on the basis of Forty-Five Cents per hundred pounds, petitioner had not only the right but also the duty to collect the difference as undercharges. The transactions were contractual in their nature, the freight being tendered by respondent and petitioner accepting the freight for transportation. The shipments were actually carried from El Paso to Phoenix. Thus petitioner fully discharged its contractual obligation. There remained only the payment by respondent to petitioner of the legal freight charges. Respondent had paid less than the legal freight charges. Thus, petitioner was bound to institute suit therefor upon the respondent's refusal to pay the undercharges. Petitioner recovered the amount of its undercharges by judgment in the trial court.

Some eight months later, the Congress enacted Part IV of the Interstate Commerce Act, and while the cause was pending on appeal. Respondent thereupon interposed said new law as a complete defense to petitioner's judgment and cause of action. A careful reading of Part IV, and especially Section 419 thereof (49 U. S. C. Sec. 1019) discloses that the Congress did not intend said statute to apply to petitioner's accrued cause of action and judgment based thereon. It is perfectly apparent that the Congress intended to exempt persons only from criminal prosecutions and penal forfeitures. This construction is implicit in view of the extremely strong presumption that Congress never intends a statute to have a retroactive operation as to fixed contractual or common law rights. A consideration of the entire Act, that is, Part IV of the Interstate Commerce Act, and especially Section 409 thereof (49 U. S. C. Sec. 1009), reenforces the conclusion that

Congress never intended said statute to have a retroactive operation insofar as petitioner's cause of action and judgment are concerned.

To construe such statute as having a retroactive operation on petitioner's cause of action raises a serious and, in fact, an insurmountable constitutional question. The "due process clause" of the Fifth Amendment to the Constitution is still in full force and effect in this country, so far as we are advised. We realize the plenary powers given Congress under the commerce clause of the Constitution; but, nevertheless, the powers granted under the commerce clause are subject to the restrictions and prohibitions of the Fifth Amendment.

Surely a contractual right, which arose by petitioner's predecessor's full performance of a preexisting contract, with nothing more to be done upon its part, cannot be abolished by the Congress under the pretext of regulating interstate commerce. The statute in question can be construed in such a way as to eliminate the constitutional question and yet carry out the Congressional intent. It should be so construed.

Argument.

The statute which the State Courts held granted respondent immunity from liability herein, as codified, is as follows:

> "Liability for Past Acts and Omissions.
>
> "No person shall be subject to any punishment or liability under the provisions of this chapter and chapters 1, 8, and 12 of this title on account of any act done or omitted to be done, prior to the effective date of this chapter, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor ve-

hicle, subject to this chapter and chapters 1, 8, and 12 of this title." (49 U. S. C. Sec. 1019).

It will be noted that said statute provides that no person shall be subject to any punishment or liability under various provisions of the Interstate Commerce Act. The word "punishment" is first used and is coupled with the word "liability." The word "liability" has a broader connotation than the word "punishment." If Congress had intended the act to apply both to civil and criminal acts, the word "liability" would have been sufficient without inserting the word "punishment." Very evidently, the Congress intended the statute to be more restrictive than the use of the word "liability" only would have given it. The rule of *ejusdem generis* is applicable here.

In *Right of Way Oil Co.* v. *Gladys City Oil and Gas Co.*, 106 Tex. 94, 157 S. W. 737, it was said:

> "The rule of construction of 'ejusdem generis' is thus stated, 'General words following particular words will not include things of a superior class.' There is this further restriction of general words following particular words, that the general words will not include any of a class superior to that to which the particular words belong" (at 157 S. W. 739).

In the statute under consideration, the particular word "punishment" was first used by Congress, followed by the general word "liability." Therefore, the general word "liability" will not include anything broader than the preceding particular word "punishment." By common usage, "punishment" ordinarily refers to a violation of a penal statute.

It should be remembered that the Interstate Commerce Act contains a number of provisions denouncing violations and fixing punishments therefor. Most of such penal violations are punishable by either or both fine and imprison-

ment. Certainly, the Congress used the phrase "punishment or liability" deliberately in order to obviate any question of whether the word "punishment" should be limited to offenses punishable by imprisonment. It is evident that Congress meant to excuse violators who might suffer either imprisonment, monetary fines, or other pecuniary sanctions.

This conclusion is further strengthened by the report of the Committee on Interstate and Foreign Commerce as shown by House Report No. 1172, 77th Congress, First Session. On page 18 of said report, with reference to said statute regarding liability for past acts and omissions, the Committee expressly stated:

"Common law and contractual rights, remedies, and liabilities are not affected by this provision."

Certain it is that petitioner's cause of action here is based upon contractual rights for services long since performed, with nothing remaining to be done by petitioner as the carrier. Surely Congress did not intend said statute to have a retroactive effect on petitioner's cause of action.

From its earliest days, this Honorable Court has followed the rule of construction that no statute is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared or to be necessarily implied. Pursuant to that rule, courts will apply new statutes only to future cases unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms. *In Re*

Twenty Per Cent Cases, 87 U. S. 179, 20 Wall. 179, 22 L. Ed. 339.

In *Reynolds* v. *McArthur*, 27 U. S. 417, 2 Pt. 417, 7 L. Ed. 470, Chief Justice Marshall said:

> "It is a principle which has always been held sacred in the United States that laws by which human action is to be regulated look forward not backward; and are never to be construed retrospectively unless the language of the Act shall render such construction indispensable." (At 7 L. Ed. 476)

Said rule of construction has been applied by this Honorable Court invariably under numerous diverse, factual situations. *Hassett* v. *Welch*, 303 U. S. 303, 58 S. Ct. 559, 82 L. Ed. 858; *U. S. Fidelity & Guarantee* v. *U. S.*, 209 U. S. 306, 28 S. Ct. 537; 52 L. Ed. 804; *U. S.* v. *Heth*, 3 Cranch. 399, 2 L. Ed. 479; *U. S.* v. *Burr*, 159 U. S. 78, 15 S. Ct. 1002, 40 L. Ed. 82; *Shwab* v. *Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747; *Royal Oak Drain District* v. *Keefe* (C. C. A. 6th) 87 Fed. 2d 786.

In the case of *U. S.* v. *St. L. S. F. & T. Ry. Co.*, 270 U. S. 1, 46 S. Ct. 182, 70 L. Ed. 435, the statute there under consideration evidenced a much more positive Congressional intent to give retrospective operation. In that case, the statute provided a three-year period of limitation which would apply to all causes of action, whether same accrued before or after the passage of the statute of limitation. More positive language could hardly be imagined. Nevertheless, Mr. Justice Brandeis, writing the opinion of this Honorable Court, denied application of the new statute of limitation to the pending lawsuit. Justice Brandeis stated in substance that to apply the new statute of limitation would raise a grave constitutional question which was to be avoided. The case just cited is precisely in point, but the State Courts brushed it aside.

The Supreme Court of Texas, in its opinion, held that petitioner's cause of action is predicated upon Section 217b of Part II of the Interstate Commerce Act, and hence the suit is not based upon a contract, but arises by reason of special statutory authority. The Court further stated that the right of action, being given by statute, may be taken away at any time. The State Court's major premise was fallacious, however, because petitioner's cause of action was based upon the performance of a contract of carriage, which had been fully performed by the carrier. In the case of *New* v. *Denison Clay Co.*, (C. C. A. 5th) 260 Fed. 70, it was held that a suit for a freight charge based upon bills of lading was not a suit on a liability created merely by statute, but was one on an agreement, contract, or promise in writing.

The case of *Pacific Mail Steamship Co.* v. *Joliffe*, 69 U. S. 450, 2 Wall. 450, 17 L. Ed. 805, is directly in point. In that case a statute of California provided that a licensed pilot was entitled to half-pilotage fees when he offered to pilot an incoming vessel into harbor where his offer was rejected. The pilot brought suit for such half-pilotage fees. The suit was defended on the ground that after his cause of action accrued, the California Legislature repealed the half-pilotage statute. The Supreme Court of the United States held that the pilot was nevertheless entitled to recover on the ground that his right was a vested right which should not be affected by the repealing of the statute. The court held that his right was in the nature of a contract and might be termed a quasi contract. The court held that when a right has arisen under a contract, or a transaction in the nature of a contract authorized by statute, and such right has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. That it has become a vested right, which stands independent of the statute.

In the instant case, Phoenix-El Paso Express had carried shipments in question and thereby fully completed its contractual obligation, as provided by the bills of lading. Nothing more remained to be done by the carrier. The duty rested upon respondent to pay the full, legal charges, as provided by the bills of lading and by *Title 49, U. S. C. A., Sec. 317b.* The right and duty to collect its full, legal freight charges accrued when the shipments were delivered to the consignee. Nothing more remained to be done by the carrier to perform fully its contracts of carriage. The right to collect its legal freight charges was vested, and it was not competent for the Congress to take away this right. Hence, it can not be presumed that the Congress intended any retroactive operation of the statute in question, to wit *Title 49, U. S. C. A., Sec. 1019.*

To give said statute the effect attributed it by the Court of Civil Appeals would result in an absurd construction. By thus construing said statute and by literally carrying out such construction to its logical conclusion, no Federal motor common carrier could collect any freight charges due from freight forwarders for services rendered prior to the enactment of Part IV of the Interstate Commerce Act.

In the case of *Haggar Co.* v. *Helvering*, 308 U. S. 389, 60 S. Ct. 337, 84 L. Ed. 340, it was held that a literal reading of a statute which leads to an absurd result is to be avoided when the statute can be given reasonable application.

Our view is strengthened by reading of the entire Act, Part IV of the Interstate Commerce Act, and especially Section 409 thereof, which provides as follows:

"(a) In order to provide a reasonable period of adjustment within which rates and charges may be established pursuant to the provisions of section 1008, nothing, in this chapter and chapters 1, 8, and 12 of this title shall be construed to make it unlawful for freight forwarders and com-

mon carriers by motor vehicle subject to chapter 8 of this title to operate under joint rates or charges during a period of eighteen months from May 16, 1942, but not thereafter. The provisions of chapter 8 of this title shall apply with respect to such joint rates or charges and the divisions thereof, and with respect to the parties thereto, as though such joint rates or charges had been established under the provisions of such chapter 8, and the provisions of this chapter shall not apply with respect thereto: *Provided*, however, That—

(1) Joint rates or charges and concurrences, contained in tariffs heretofore filed with the Commission shall become effective, without notice, as of May 16, 1942, unless the parties thereto file notice with the Commission, within thirty days after May 16, 1942, cancelling such joint rates or charges and concurrences;

(2) Joint rates or charges and concurrences, contained in tariffs heretofore offered for filing with the Commission, but rejected by the Commission, shall become effective, without notice, as of May 16, 1942, if filed with the Commission within thirty days after May 16, 1942;

(3) Joint rates or charges and concurrences, under which freight forwarders and common carriers by motor vehicle subject to chapter 8 of this title were actually operating on July 1, 1941, may become effective, without notice, as of May 16, 1942, if tariffs covering such joint rates or charges and concurrences are filed with the Commission within thirty days after May 16, 1942;

(4) After the expiration of six months from May 16, 1942, (i) no new or additional joint rates or charges or divisions may be established under authority of this section, and (ii) no change shall be made in any joint rate or charge or division established, or which becomes effective, pursuant to this sub-section, except as may be expressly authorized or required by order of

the Commission in the exercise of its powers under chapter 8 of this title;

(5) Any joint rate or charge or concurrence established, or which becomes effective, pursuant to this subsection may at any time be canceled or withdrawn in accordance with the provisions of chapter 8 of this title;

(6) The filing of tariffs under paragraph (2) or (3) of this subsection may be in accordance with the requirements with respect to the form and manner of filing tariffs in effect under chapter 8 of this title prior to December 31, 1936;

(7) For the purpose of computing the period of thirty days prescribed in paragraph (1), (2), or (3) of this sub-section, the date of mailing by registered mail shall be deemed the date of filing; and

(8) As used in this subsection the term "rates or charges" includes classifications, rules, and regulations with respect thereto.

(b) If the Commission shall find that the purposes of this section may be carried out within a shorter time than such period of eighteen months, it shall by order fix a date prior to the expiration of such period after which the joint rates or charges and concurrences referred to in this section shall no longer be lawfully in effect. Feb. 4, 1887, c. 104, Part IV, § 409, as added May 16, 1942, c. 318 § 1, 56 Stat. 290." (49 U. S. C. Sec. 1019).

It is significant that said Section 409 does not undertake in any way to validate the prior joint rates or concurrences between freight forwarders and common carriers. It is expressly stated that each of the provisions during the adjustment period shall become effective as of the date of enactment of Part IV of the Interstate Commerce Act.

In ascertaining the Congressional intent, the entire act should be examined, rather than the single section only,

that is, Section 419 of Part IV of the Interstate Commerce Act. Thus in *U. S.* v. *Burr*, 159 U. S. 78, 15 S. Ct. 1002, 40 L. Ed. 82, it is said:

> "Moreover, in arriving at the true intention of Congress, we cannot treat Section 1 as if it constituted the entire act, but must deduce the intention from a view of the whole statute and from the material parts of it" (At page 40, L. Ed. 84).

We now consider the constitutionality of said Section 419, of Part IV of the Interstate Commerce Act, insofar as it was intended to be or is, in fact, applicable to petitioner's lawsuit. Undoubtedly, petitioner's right of action herein is protected by the Fifth Amendment. In *Pritchard* v. *Norton*, 106, U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104, it was said:

> "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it away. A vested right to an existing defense is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract, and are not based on equity and justice. Cooley, Const. Lim., 362-369" (at 27 L. Ed. 107).

In the case of *Chemical Foundation* v. *Du Pont* (C. C. A.), 39 Fed. 2d 366, affirmed 283 U. S. 152, 51 S. Ct. 403, 75 L. Ed. 919, it was said:

> "The right to the accrued royalties, in whomsoever vested, is a chose in action; a chose in action is property; and an act which takes property from one person and gives it to another without legal procedure to determine their rights and without compensation is a deprivation of property without due process of law and

is violative of the Fifth Amendment to the Constitution."

We recognize that Congress has the broadest powers under the Constitution to regulate interstate and foreign commerce, but, nevertheless, it has been held that the commerce power cannot abrogate the Fifth Amendment. Thus in *Currin* v. *Wallace*, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441, it was held that although the power of Congress to regulate interstate commerce is plenary, such power is subject to the "due process clause" of the Fifth Amendment.

We flatly assert that private vested rights between individuals cannot be abrogated by the legislative branch of the government. *Chemical Foundation* v. *Du Pont* (C. C. A.) 39 Fed. 2d 366, affirmed 283 U. S. 152, 51 S. Ct. 403, 75 L. Ed. 919; *Union Pacific Ry. Co.* v. *Laramie Stockyards Co.*, 231 U. S. 190, 34 S. Ct. 101, 58 L. Ed. 179; *Forbes Pioneer Boat Co.* v. *Board of Commissioners*, 258 U. S. 338, 42 S. Ct. 325, 66 L. Ed. 647; *Ettor* v. *Tacoma*, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773; *Choate* v. *Trapp*, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941; *Lynch* v. *U. S.*, 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434; *Herrick* v. *Boquillas Land & Cattle Co.*, 200 U. S. 97, 26 S. Ct. 192, 50 L. Ed. 389.

The Supreme Court of Texas held that petitioner's cause of action was based purely on a statutory right which could be repealed by Congress. The cases cited by the Supreme Court of Texas are correct in their respective factual situations; but the Supreme Court of Texas erred in its major premise to the effect that petitioner's cause of action was a mere statutory right.

Petitioner's contract of carriage had already been performed. The right to compensation had become vested. The case of *Pacific Mail Steamship Co.* v. *Joliffe*, 69 U. S. 450, 2 Wall. 450, 17 L. Ed. 805, is exactly in point. In said case, it was expressly held that when a right has arisen

under a contract or transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting the right, the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right which stands independent of the statute. It will be noted that in its opinion, the Supreme Court of Texas does not even mention the latter case.

The Supreme Court of Texas failed to grasp the distinction which has always been made in this Honorable Court between statutes involving vested rights and those which have to do with mere irregularities, special privileges, special defenses, and the like. The State Court in its opinion followed the rule that where an action is based entirely upon a statutory right, the cause of action falls with the repeal of the statute. The rule just stated has always been limited in its application to suits for penalties, forfeitures, *qui tam* actions, and the like.

The State Court held that it was evident that petitioner does not possess such a vested right as is protected by the Fifth Amendment. Further that such a right must be something more than a mere expectation based upon an anticipated continuance of the existing law. The State Court failed to realize that petitioner's cause of action does not depend upon the continuance of an existing law. Its contract was completed in 1937 and its right to compensation became vested at that time. Of course, if petitioner sought performance of an executory contract, which afterwards was prohibited by a statute (within the power of Congress to enact), petitioner could obtain no relief. Its private claims under its contract would have to yield to the sovereign power of the country. But such is not the case in the instant suit. Its cause of action arises from an executed contract of carriage, and failure on petitioner's part to col-

lect the undercharge would result in a discrimination forbidden by law.

In its opinion, the State Supreme Court relied heavily upon the case of *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240, 55 S. Ct. 407, 79 L. Ed. 885. A careful analysis of said case will show that it is not decisive of the question here presented, and the State Court utterly failed to comprehend the true meaning of the opinion in that case. The Supreme Court very properly held that the "gold clause" contained in the instruments there involved did not call for payment in gold as a commodity, or in bullion, but for the payment of money, the value of which could properly be regulated by Congress. It was held that the parties contracted with full knowledge of the Federal government's power to regulate the value of money, and that no contract nor any contractual rights could fetter the sovereign power and the Federal government in this respect. Moreover, by eliminating the gold clause, the Congress did not take away property. The holders of the gold clause contracts could still collect the full amount of their debt in legal tender of the United States. Certainly the decision would have been quite different if the Congress had undertaken to prevent the creditors from collecting their debts.

It is earnestly submitted that it was not competent for Congress to abolish petitioner's cause of action and judgment based thereon by the enactment of said Section 419 of Part IV of the Interstate Commerce Act. Said statute can be construed in a way to eliminate the constitutional question. This Honorable Court has repeatedly held that it will adopt that one of two possible constructions of a statute which will save and not destroy, and will not attribute to Congress an intention to defy the Fifth Amendment or even to come so close to doing so as to raise a serious question of constitutional law. *Anniston Mfg. Co.* v.

Davis, 301 U. S. 337, 57 S. Ct. 816, 81 L. Ed. 1143; *Panama Ry. Co.* v. *Johnson,* 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; *Arkansas Natural Gas Co.* v. *Arkansas RR. Co.,* 261 U. S. 379, 43 S. Ct. 387, 67 L. Ed. 705.

Conclusion.

WHEREFORE, petitioner respectfully prays that writ of certiorari be granted and upon hearing of this cause, the judgment of the Supreme Court of Texas be reversed and the judgment of the Forty-first Judicial District Court of El Paso County, Texas, be affirmed, and that petitioner recover its costs in this Court, and that petitioner have such other relief as it may be entitled to, either at law or in equity.

ROBERT L. HOLLIDAY,
El Paso, Texas,
HAROLD L. SIMS,
El Paso, Texas,
Attorneys for Petitioner.

Robert L. Holliday, one of the counsel preparing the foregoing brief and petition, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same and that such petition and brief are not interposed for delay.

ROBERT L. HOLLIDAY.

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 909.

PHOENIX-EL PASO EXPRESS, INC., *Petitioner*,

v.

NATIONAL CARLOADING CORPORATION, *Respondent*.

REPLY BRIEF OF NATIONAL CARLOADING CORPORATION.

PAUL J. COUGHLIN,
19 Rector Street,
New York City,

ROBERT E. QUIRK,
Investment Building,
Washington, D. C.,

THORNTON HARDIE,
Bassett Tower,
El Paso, Texas,
Attorneys for Respondent.

ROBERT L. HOLLIDAY,
HAROLD L. SIMS,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

INDEX OF CASES AND OTHER AUTHORITIES.

STATUTES AND CONSTITUTIONAL PROVISIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 909.

PHOENIX-EL PASO EXPRESS, INC., *Petitioner*,

v.

NATIONAL CARLOADING CORPORATION, *Respondent*.

BRIEF OF NATIONAL CARLOADING CORPORATION IN REPLY TO PETITIONER'S BRIEF.

A. STATEMENT OF THE POINT AT ISSUE BEFORE THIS COURT.

Phoenix-El Paso Express, a partnership, at times here material, was engaged as a common carrier by motor vehicle in interstate commerce. It seasonably filed an application with the Interstate Commerce Commission for a certificate under section 206 of the Interstate Commerce Act. Respondent had on file with that Commission a similar application. Each had filed tariffs with that Commission. The respondent published and filed tariffs which named joint rates between various points in the United States. The Phoenix-El Paso Express was a party to those tariffs by appropriate concurrence or powers of attorney filed with the Interstate Commerce Commission. Under these joint tariffs the respondent and the Phoenix-El Paso Express divided the joint rates upon an agreed

basis. The Phoenix-El Paso Express also filed and published tariffs naming local rates applicable to local traffic transported between points served by it, including such points as El Paso, Texas, and Phoenix, Arizona.

The respondent accepted various shipments of merchandise at eastern points which it agreed to transport through to Phoenix, Arizona, in connection with the Phoenix-El Paso Express through El Paso, Texas. The through rates applicable from points of origin to Phoenix via El Paso in connection with the Phoenix-El Paso Express were shown in the published tariffs of the respondent in which, as heretofore stated, the Phoenix-El Paso Express concurred by power of attorney. In other words, respondent acted as agent for the Phoenix-El Paso Express in the publication of these joint through rates. It was agreed between the respondent and the Phoenix-El Paso Express that the latter should receive 45 cents per hundred pounds for its services from El Paso to Phoenix out of such joint through rates. Where a joint through rate is published in a tariff on file with the Interstate Commerce Commission applicable to interstate commerce, such a rate takes precedence over local rates and is the lawful rate applicable to the through shipment between points of origin and destination. *B. & O.* v. *Settle,* 260 U. S. 166; *Western Oil Co.* v. *Lipscomb,* 244 U. S. 346. The published rate applicable to interstate shipments must be exacted even though it violates the substantive provisions of the Interstate Commerce Act in that it is excessive, unreasonable and unjustly discriminatory. *L. & N.* v. *Sloss-Sheffield, etc.,* 269 U. S. 217.

At the time the shipments involved moved the respondent and the Phoenix-El Paso Express believed that each had a right to operate as a motor carrier of merchandise and that the tariffs in question, the concurrences and agreements under which the Phoenix-El Paso Express received 45 cents per hundred pounds were legal. That amount was paid by the respondent to the Phoenix-El Paso Express.

In *Tariffs of Freight Forwarding Companies*, 23 M. C. C. 95, decided May 7, 1940, the Commission found that the joint tariffs of respondent and other freight forwarding companies which maintained joint rates with common carriers by motor vehicle were not in consonance with section 217 (a) of the Interstate Commerce Act, and entered an order requiring that such tariffs be stricken. That order never became effective, having been postponed from time to time, and with the passage of Part IV of the Interstate Commerce Act May 16, 1942, the order was suspended. In that decision, the Commission followed its decision in the *Acme Case*, 17 M. C. C. 549, sustained in *Acme, etc.* v. *United States*, 30 Fed. Supp. 968, affirmed in 309 U. S. 638. On January 4, 1940, the Commission had determined that the respondent is not a common carrier by motor vehicle under the provisions of Part II of the Interstate Commerce Act, 21 M. C. C. 309. In that proceeding, the Commission dismissed the application of the respondent for a certificate to operate as a motor carrier under the provisions of the Motor Carrier Act.

Section 206 (a) of the Interstate Commerce Act affirmatively provides in connection with applications for certificates that,

> "Pending the determination of any such application, the continuance of such operations shall be lawful."

Among the thousands of applications which were filed with the Commission under the Federal Motor Carrier Act for certificates to operate as a common carrier or permits to operate as a contract carrier, it frequently happened that the Commission issued a cetificate when a permit was sought, and vice versa. Meanwhile, the applicant proceeded to function according to his own determination of his status. The *Craig Case*, 24 M. C. C. 331, is a good illustration. Craig assumed that he was a contract carrier and sought a permit to continue to operate as such. The Commission determined that he was a common carrier and it issued a certificate. The final determination was